APPENDIX A

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

Nos. 93-7188, 93-7189

BENNETT ENTERPRISES, INC.,
Appellee,

v.

DOMINO'S PIZZA, INC.,
Appellant,

DOMINO'S PIZZA DISTRIBUTION CORPORATION, INC.,
Appellant.

BENNETT ENTERPRISES, INC.,
Appellant,

v.

DOMINO'S PIZZA, INC.,
Appellee,

DOMINO'S PIZZA DISTRIBUTION CORPORATION, INC.,
Appellee.

Cross Appeals from the United States District Court
for the District of Columbia
92cv01111

Argued Dec. 6, 1994

Decided Feb. 3, 1995

Rehearing and Suggestion for Rehearing
In Banc Denied April 7, 1995

Before SILBERMAN, BUCKLEY, and SENTELLE, Circuit Judges.

SENTELLE, Circuit Judge:

Domino's Pizza, Inc. ("Domino's") appeals a jury verdict awarding Bennett Enterprises, Inc. ("Bennett") $2,250,000 in compensatory and punitive damages on its claims for breach of contract and tortious interference with a prospective economic benefit, arising from Domino's' default of its franchise agreement for failure to pay taxes and the subsequent sale of its store. Because the franchise agreement was, as a matter of law, unambiguous regarding Domino's' right to place a franchisee in default for failure to adhere to the tax laws and there was no other sufficient evidence of contract breach, and because the elements of tortious interference were not made out, the judgment is hereby reversed.

I. BACKGROUND

In December 1987, Bennett, a corporation created by Bruce and Arthur Bennett, two experienced Domino's managers, entered a franchise agreement with Domino's providing that Bennett would operate a Domino's pizza store on Hawaii Avenue in Washington, D.C. The agreement provided in section 15.2, under the heading "Operating Requirements," that Bennett "agree[d] to secure and maintain in force all required licenses, permits and certificates and operate the Store in full compliance with all applicable laws, ordinances and regulations." Section 18.2, under "Termination and Expiration," stated that Domino's had the right to terminate the franchise agreement if Bennett did certain enumerated things, such as underreporting royalty sales, or "fail[ing] to comply with any other provision of this Agreement or any specification, standard or operating procedure and [failing] to correct this failure within thirty (30) calendar days after written notice." In section 11, Domino's agreed to provide "such reasonable operating assistance as [it] deter-

mined from time to time to be necessary for the operation of the Store," including advice and guidance regarding "the establishment of administrative, bookkeeping, accounting, inventory control and general operating procedures." Section 11 further stated that this assistance did not obligate Domino's to operate the store or "to provide the accounting or bookkeeping services required for the operation of the Store." Additionally, section 18.2(j) provided that Domino's had the right to terminate the agreement if Bennett failed to "pay when due any amount owed to [Domino's] . . . or any creditor or supplier of the Store (other than amounts being bona fide disputed through appropriate proceedings)" and did not remedy this failure within fifteen days after the receipt of written notice.

After opening in December 1987, the store sold many pizzas but, for various reasons, did not turn a profit. Central to the problems was Bennett's failure to control its costs, file its required profit and loss reports with Domino's, and, most importantly, pay its federal, state, and D.C. payroll, income, and sales taxes for most of 1988. At trial, Arthur Bennett stated that Bennett's first two accountants, whom Bennett chose and who were not employed by Domino's, both failed to pay any of Bennett's taxes or file the profit and loss statements. Bruce Bennett admitted that he had to write all the checks to pay bills and accounts payable and that while he paid other bills, he did not write any checks to pay taxes. Bennett had also failed to make payments to a creditor James Artis, who had loaned the Bennett brothers initial capital. Artis obtained a $66,300 judgment against Bennett in April 1989.

Bennett's first accountant, Patrick Miller, called Domino's in February 1988 to say that Bennett was having accounting and cash control problems and stated that he felt they may not have paid any taxes. Artis contacted Domino's Franchise Operations Director Patricia Harriday

in July 1988 and told her that Bennett was not giving its accountants the proper information to prepare profit and loss statements and was not paying its taxes. Domino's then contacted Bennett's accountant to confirm that Bennett had not paid taxes, and arranged a July 1988 meeting with Bennett, during which Domino's told Bennett to resolve its tax problem and suggested ways it could cut costs and increase profits. Harriday testified that in September and October 1988 she had several meetings with Bennett to advise the company further and that Bennett failed to show up for several and generally showed little progress in making tax payments.

In December 1988, Domino's notified Bennett that it was placing it in default of the franchise agreement for violating section 15.2 by failing to pay taxes, and gave Bennett thirty days to cure the default. In February 1989, after the IRS said it would take six to ten weeks to get a tax payment plan set up, Domino's took Bennett out of default with the proviso that if Bennett did not have its prepayment plan set up within ten weeks, it would again be placed in default.

In November 1988, Bennett hired accountant Gordon Clay. Clay testified that, as of his hiring, Bennett had not yet paid any 1988 taxes and that, starting in late 1988 to early 1989, Bennett began to pay its current tax liabilities and to get its costs under control. Bennett also handed over its check writing responsibilities to Clay at this time. Clay stated that Domino's contacted him in December 1988 inquiring about the status of Bennett's financial information and preparation of a tax plan to pay those liabilities. In the spring of 1989, Clay was able to work out a tax repayment plan with D.C. but had not yet worked out such a plan with Maryland or the IRS by April 1989.

In April 1989, Domino's notified Bennett that its failure to remedy its tax liabilities placed it in default of section 15.2 of the franchise agreement, and gave Bennett

thirty days to either pay the taxes or demonstrate to Domino's that it had payment plans in place. Unable to resolve its tax problems, Bennett sought a buyer for the franchise, and Domino's gave it until June 1989 to do so. There were several ways in which to value the store to determine its offering price. The valuation method in section 19 of the franchise agreement, which gave Domino's the option to purchase the store, gave a value of approximately $424,000 based on sales in the previous twelve months. At trial, the parties disputed whether another formula, used for successful stores, would yield a valuation of $1.2 million or of roughly $600,000.

In May 1989, Bennett approached Meeks, another Domino's franchise owner, with an offer to sell him the store for $1.5 million, which Meeks refused. Bennett then negotiated with another owner, Duignan, who originally suggested a price of $900,000 based on Bennett's representations that its sales were $1.8 million. After finding out that his bank would not lend him $900,000 to buy the store and that Bennett's sales were actually $1.3 million, Duignan decided to withdraw his offer. Bennett then agreed to sell the store to Meeks for $500,000 but made a last minute deal with Duignan to sell for $600,000. Domino's gave Bennett an extension of the default deadline to complete negotiations and approved the sale to Duignan. At trial, Bennett offered evidence of a conversation between Domino's franchise consultant, Susan Fulton, and Meeks, after Meeks had made his $500,000 offer, in which Meeks stated that Bennett's store had operational problems and Fulton acknowledged that these problems did exist.

Three years later, Bennett sued Domino's for breach of the franchise agreement on the ground that the agreement did not entitle Domino's to declare Bennett in default on the basis of tax liabilities. Bennett asserted that section 15.2, which required compliance with all applicable laws, did not give Domino's the right to default

Bennett for nonpayment of taxes. At trial, Bennett elicited testimony from Domino's officials that the term "applicable laws" would not encompass things such as parking tickets. On the basis of the franchise agreement's purported ambiguity, the district court admitted into evidence subsequent versions of Domino's standard franchise agreement, which specified that Domino's had a right to default the franchisee for nonpayment of taxes. Bennett further argued that Domino's had an obligation under the agreement to assist it in resolving its tax problems, which Domino's failed to fulfill. Bennett also claimed that Domino's tortiously interfered with its prospective economic advantage by disseminating information about Bennett's financial situation to potential buyers, thus causing the buyers to rescind or lower their offers. As a result, Bennett claimed that it was forced to sell the store for less than its actual value.

After a three-day trial, the jury awarded Bennett $850,000 in damages on its claim that Domino's breached the franchise agreement by declaring Bennett in default and by failing to offer reasonable assistance in resolving Bennett's tax problems. The jury also found that Domino's intentionally and tortiously interfered with Bennett's prospective economic advantage and awarded $450,000 in damages. Finally, the jury gave Bennett $950,000 in punitive damages.

Domino's moved for judgment as a matter of law or a new trial on the basis that the verdict was against the weight of the evidence and that the tortious interference award was duplicative of the breach of contract damages. The district court concluded that the jury's verdict was consistent with the evidence and that recovery in tort and contract was permissible because the damages compensated Bennett for two discrete harms. The district court also denied Bennett's motion to alter or amend the judgment, which argued that the district court erred in instructing the jury to subtract the $600,000 sale price from the breach of contract award.

II. DISCUSSION

A. Breach of Contract Claims

Domino's states that section 15.2 unambiguously authorized Domino's to default Bennett for failure to obey the tax laws since it obligated Bennett to operate its store "in full compliance with all applicable laws, ordinances and regulations." Although the tax laws were not specifically mentioned, Domino's asserts that the term "all applicable laws" must be read in its plain and ordinary meaning to encompass every law without exception.

District of Columbia law governs this diversity action. *Erie R.R. Co. v. Tomkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938); *Gray v. American Express Co.*, 743 F.2d 10, 16-17 (D.C.Cir.1984) (District of Columbia law is treated as state law for purposes of the "Erie Doctrine"). Under District law, the question whether a contract provision is ambiguous is a question of law, which this court reviews *de novo*. *Harbor Ins. Co. v. Omni Constr., Inc.*, 912 F.2d 1520, 1522 (D.C.Cir. 1990). A contract provision is ambiguous if it is reasonably susceptible of different constructions, *id.*, but it is not ambiguous merely because the parties later disagree on its meaning. *Clayman v. Goodman Properties, Inc.*, 518 F.2d 1026, 1034 (D.C.Cir.1973); *Kass v. William Norwitz Co.*, 509 F.Supp. 618, 623 (D.D.C.1980). The admissibility of extrinsic evidence and the possible need for a jury to assess it depend upon the existence of an ambiguity in the contract. *Clayman*, 518 F.2d at 1034; *Kass*, 509 F.Supp. at 623.

The language of section 15.2 is not ambiguous in its application in this case because it is not reasonably or fairly susceptible to an interpretation that does not encompass compliance with state and federal tax laws. That the contract may not be interpreted absolutely so as to include parking laws does not change the fact that any reasonable construction of the language "all applicable

laws" in a business franchise agreement must include tax statutes at the very minimum. To that extent the contract is unambiguous, and that is the only extent with which we are concerned. Thus, the district court erroneously admitted into evidence subsequent forms of Domino's' standard franchise agreement that expressly set forth violation of the tax laws as a reason for default. Under the franchise agreement Domino's had the right to place Bennett in default for failure to pay taxes. The question then becomes whether the evidence established that Domino's breached the contract as interpreted by this court.

In reviewing the trial court's decision on a motion for judgment as a matter of law, we evaluate *de novo* whether the prevailing party proffered sufficient evidence upon which a jury could properly base a verdict in its favor. *Mackey v. United States,* 8 F.3d 826, 829 (D.C.Cir. 1993). We, like the trial court, view the evidence in the light most favorable to the prevailing party, and the jury's verdict must stand unless the evidence, together with all inferences that can reasonably be drawn therefrom, is so one-sided that reasonable people could not disagree on the verdict. *Id. See also McNeal v. Hi-Lo Powered Scaffolding, Inc.,* 836 F.2d 637, 640-41 (D.C.Cir.1988); *Carter v. Duncan-Huggins, Ltd.,* 727 F.2d 1225, 1227 (D.C. Cir. 1984).

While, at the end of 1988, Bennett started to pay current taxes as they became due, as of April 1989, when Domino's placed it in default, Bennett admittedly still had not remedied its large outstanding tax liabilities arising from its failure to pay taxes for much of 1988, and it never negotiated payment plans with Maryland or the IRS. Thus, the evidence was undisputed that Bennett was not in compliance with the tax laws at the time of default. Because there was no countervailing evidence upon which the jury could base its conclusion that Domino's breached the contract by exercising its right to place Bennett in default for failure to adhere to the applicable tax laws, the verdict on this claim cannot stand.

Bennett also failed to make out a breach of contract under section 11 of the franchise agreement. The evidence is undisputed that Domino's provided Bennett more than the reasonable assistance that section 11 of the franchise agreement required. Bennett admitted that Domino's offered an accounting service to provide bookkeeping and tax services for an extra charge and that it declined to use this service and instead hired its own accountant. Also, neither Bennett nor its accountant submitted the required profit and loss statements until many months had elapsed, and thus Domino's could not verify whether the accountant's speculation that Bennett was not paying tax was true. Bennett either knew or should have known that it was not paying its tax at this time since Bruce Bennett was responsible for writing the checks to pay all bills until he turned over this responsibility to his accountant at the end of 1988. Furthermore, once Domino's confirmed that Bennett had tax problems, it reviewed Bennett's books, scheduled meetings to help Bennett handle this problem, recommended that Bennett hire a new accountant to set up a tax repayment plan, and gave Bennett several months to cure by taking it out of default after the December notice.

Under section 11 of the franchise agreement, Domino's was obligated merely to provide "such reasonable operating assistance as [it] determined from time to time to be necessary for the operation of the Store." It specifically was not obligated to operate the store or "to provide the accounting or bookkeeping services required for the operation of the Store." The franchise agreement makes it explicit that Bennett was responsible for obtaining its own accounting services and paying its own taxes. The undisputed evidence established that once the tax problem was verified, Domino's provided Bennett extensive assistance, and no reasonable factfinder could draw from this evidence the inference that Domino's failed to offer Bennett the contractually required "reasonable operating assistance." Accordingly, the jury's verdict on this issue is unsupported by the evidence and must be reversed. *Cf.*

Mackey v. United States, 8 F.3d at 829 (the jury's verdict must stand unless the evidence, together with all the inferences that can reasonably be drawn therefrom, is so one-sided that reasonable people could not disagree on the verdict).

B. Tortious Interference with Economic Advantage

Bennett argued that Domino's tortiously interfered with its reasonable business expectancy of receiving between $900,000 and $1.5 million. The jury awarded $450,000 in damages for tortious interference, suggesting that the store could have been sold for $1,050,000 had Domino's not allegedly interfered. At trial, Bennett pressed two grounds for its tortious interference claim: 1) that Domino's wrongly placed it in default and gave it only thirty days in which to sell, thereby preventing it from maximizing the sales price for the business; and 2) that Domino's improperly gave bidders confidential information that led them to withdraw their bids or make lower offers. In light of our holding that Domino's did not wrongly place Bennett in default, however, Bennett's first ground cannot support a tortious interference claim since the default was not wrongful.

As to the second asserted ground, Bennett introduced testimony regarding a conversation between Domino's franchise consultant Susan Fulton and Meeks, after Meeks had made his $500,000 offer, in which Meeks stated that Bennett's store had operational problems and Fulton acknowledged that these problems did exist. It appears, however, Meeks did not need to obtain this information from Domino's since Bennett had supplied him with financial information before he made his offer, and Meeks testified that the *Bennett brothers* told him that they had a short time in which to sell. Moreover, Bennett offered no evidence of any communications between Domino's and Duignan, and Duignan specifically stated that although he made an initial offer of $900,000, it was based on Bennett's initial representation that sales were $1.8

million, and that he made a $600,000 second offer based on the correct sales figure of approximately $1.3 million.

To establish a claim for tortious interference with economic advantage under District of Columbia law, the evidence must show:

> (1) the existence of a valid business relationship or expectancy,
>
> (2) knowledge of the relationship or expectancy on the part of the interferer,
>
> (3) intentional interference inducing or causing a breach of termination of the relationship or expectancy, and
>
> (4) resultant damage.

Genetic Sys. Corp. v. Abbott Labs., 691 F.Supp. 407, 422-23 (D.D.C.1988); *see also Alfred A. Altimont, Inc. v. Chatelain, Samperton & Nolan*, 374 A.2d 284 (D.C. App. 1977). As its name would suggest, *intentional* interference requires an element of intent. Further, "a general intent to interfere or knowledge that conduct will injure the plaintiff's business dealings is insufficient to impose liability." *Genetic Sys.*, 691 F.Supp. at 423. Plaintiff cannot establish liability without a "strong showing of intent" to disrupt ongoing business relationships. *Id.* Bennett's evidence in this case does not meet that standard.

Through the testimony of Meeks and Duignan and the rest of its evidence, Bennett has established at most that Domino's, through the legitimate disclosure of truthful information in the ordinary course of business, contributed to Bennett's failure to sell its troubled enterprise for as high a price as it wished. Nothing in the evidence supports more than the rankest speculation that Domino's or anyone acting on its behalf harbored any ill motive or intent to disrupt Bennett's economic advantage. Because

the claim was not made out as a matter of law, the jury's verdict must be reversed.

In light of our conclusion that Bennett did not establish liability, we need not address the parties' arguments on the proper methods for calculating damages or on the propriety of awarding punitive damages.

III. CONCLUSION

Based on the foregoing reasons, we conclude that Domino's did not breach the franchise agreement by placing Bennett in default, and that Bennett failed to proffer sufficient evidence upon which a jury could properly base a verdict in its favor for the remaining breach of contract and tortious interference with prospective economic advantage claims. Accordingly, the judgment is reversed.

APPENDIX B

[Filed Sep. 3, 1993]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 92-1111 (CRR)

BENNETT ENTERPRISES, INC.,
Plaintiff,

v.

DOMINO'S PIZZA, INC., *et al.*,
Defendants.

MEMORANDUM OPINION OF CHARLES R. RICHEY
UNITED STATES DISTRICT JUDGE

Following a jury trial in the above-captioned case, the Defendants filed a Motion for Judgment as a Matter of Law or for a New Trial, claiming that the evidence presented does not support the jury verdict in the case. In addition, the Plaintiff has filed a Motion to Alter or Amend the Judgment, claiming that the jury was not properly instructed on the issue of damages. Upon consideration of the respective Motions, the oppositions filed thereto, the applicable law, and the entire record herein, the Court must deny the Defendants' Motion and the Plaintiff's Motion. The Court finds that the jury's verdict was reasonable in light of the evidence presented, and that the Court's instructions to the jury on the issue of damages were correct.

I. BACKGROUND

The Plaintiff in this case, Bennett Enterprises, Incorporated, ("BEI"), entered a franchise agreement with the Defendants, Domino's Pizza, Incorporated, and Domino's Pizza Distribution Corporation, ("Domino's"), on December 7, 1987. The agreement provided for BEI to operate a Domino's franchise pizza store located at 333 Hawaii Avenue, N.E. in Washington, D.C. In April, 1989, Domino's placed BEI in default and threatened to terminate the franchise for BEI's alleged failure to pay certain federal and district taxes. BEI ultimately sold the franchise to a third party for $600,000.

In 1992, BEI brought suit against Domino's. A jury trial was conducted on June 14-16, 1993, at which BEI claimed that Domino's breached the franchise agreement when it placed BEI in default in 1989 and by failing to offer reasonable assistance with regard to BEI's tax situation, ultimately causing BEI to sell the franchise. BEI also charged that Domino's intentionally interfered with BEI's prospective economic advantage by giving information about the pizza store to possible purchasers, causing those purchasers to rescind or lower their offers. As a result, BEI received less than it otherwise would have from the sale of the store.

On June 16, 1993, the jury returned a verdict in favor of BEI. The jury found that Domino's had breached the franchise agreement and that BEI suffered $850,000 in damages as a result. In addition, the jury found that Domino's had intentionally and tortiously interfered with BEI's prospective economic advantage and that BEI suffered $450,000 in damages as a result. Finally, the jury awarded punitive damages in the amount of $950,000.

II. BECAUSE THE EVIDENCE PRESENTED TO THE JURY SUPPORTS THE JURY'S VERDICT, THE DEFENDANTS' MOTION FOR JUDGMENT AS A MATTER OF LAW OR FOR A NEW TRIAL MUST BE DENIED.

Rule 50 of the Federal Rules of Civil Procedure provides that "the court may grant a motion for judgment as a matter of law" if "there is no legally sufficient evidentiary basis for a reasonable jury to have found" for the non-moving party. Judgment as a matter of law should only be granted "if, viewing the evidence in the light most favorable to the plaintiff and giving [it] the advantage of every fair and reasonable inference that the evidence may permit, there can be but one reasonable conclusion drawn." *Richardson v. Richardson-Merrell, Inc.*, 857 F.2d 823, 827 (D.C. Cir. 1988), *cert. denied*, 493 U.S. 882 (1989).

Rule 59 of the Federal Rules of Civil Procedure permits the Court to grant a new trial "for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States . . . ." The decision to grant a new trial is within the sound discretion of the trial court. *Hutchinson v. Stuckey*, 952 F.2d 1418, 1420 (D.C. Cir. 1992). A new trial may be granted "if the verdict is against the weight of the evidence, damages are excessive, for other reasons the trial was not fair, or *substantial* errors occurred in the admission or rejection of evidence or the giving or refusal of instructions." *Lewis v. Elliott*, 628 F. Supp. 512, 516 (D.D.C. 1986). The Court must beware, however, not to "encroach on the jury's important fact-finding function" in reaching its decision. *Vander Zee v. Karabatsos*, 589 F.2d 723, 729 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 962 (1979).

In this case, the Defendants claim that they are entitled to judgment as a matter of law or a new trial for a number of reasons, each of which the Court shall address

in turn. First, the Defendants claim that no reasonable jury could have found that Domino's breached the franchise agreement. However, as the Court has previously held, the franchise agreement "is susceptible to varying interpretations, the correctness of which is most appropriately resolved by the jury." *Memorandum Opinion and Order* of July 27, 1992, at 2 (relying on *Kass v. William. Norwitz Co.*, 509 F. Supp. 618, 623-24 (D.D.C. 1980)).

The jury in this case could reasonably find that the franchise agreement did not authorize Domino's to place BEI in default under the circumstances, if they found that BEI was taking all available steps to remedy its tax deficiencies. Likewise, the jury could have found that Domino's had failed to fulfill its obligation to provide "reasonable operating assistance . . . necessary for the operation of the store" with respect to BEI's financial and accounting needs. *See* Franchise Agreement, ¶ 11. Failure to do so could have resulted in BEI's tax deficiencies, producing the default and the ultimate loss of the franchise.

Domino's next argues that BEI should not recover damages for the breach of contract because they are too speculative and uncertain. As Domino's concedes, "damages are not required to be proven with mathematical certainty, [although] there must be a reasonable basis on which to estimate damages." *See Defendants' Memorandum of Points and Authorities in Support of its Motion*, at 7 (citing *Romer v. District of Columbia*, 449 A.2d 1097 (D.C. Ct. App. 1982)).

In this case, the evidence on lost profits focused on the testimony of Mr. Rick Gaskins, an opinion witness put forward by the Plaintiff. The Defendants did not put forward their own opinion witness on the subject. The Defendants concede, as a general matter, that the Plaintiff could establish lost profits through the use of opinion testimony and economic data. *See Defendants'*

Reply Memorandum, at 11. They assert that Mr. Gaskins did not have a proper basis upon which to build his conclusions about the amount of profits lost because of the Defendants breach of the franchise agreement.

However, as the Plaintiff shows in its *Opposition to Defendants' Motion*, Mr. Gaskins based his opinions on appropriate financial and business data. *See id.* at 19-24. Mr. Gaskins analyzed the profitability of the BEI store, the sales data, the probable tax repayment schedule, the likelihood of franchise renewal, and other information before calculating his estimate of the lost profits. The basis for his opinion was sound, requiring the Court to "allow the opinion to be assessed by the factfinder." *Mendes-Silva v. United States*, 980 F.2d 1482, 1485 (D.C. Cir. 1983). The Defendants had an opportunity to counter Mr. Gaskins' testimony through cross-examination and the presentation of contrary evidence. The suggestion that the jury was completely unreasonable in accepting the testimony of Mr. Gaskins, at least to the extent that the jury awarded the Plaintiff $850,000 in damages for the breach of contract claim, is unsupported by the trial record in this case and is "overly pessimistic about the capabilities of the jury . . ." to determine the credibility of opinion witnesses. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786, 2798 (1993).

Moreover, counsel has overlooked the critical jury instructions the Court gave the jury with respect to opinion witness testimony pursuant to the 700 series of the Federal Rules of Evidence. For purposes of emphasis and for the benefit of counsel, the Court will repeat the instructions here:

> Please note that the rules of evidence ordinarily do not permit witnesses to testify as to their opinions or conclusions. Two exceptions to this rule exist. The first exception allows an ordinary citizen to give his or her opinion as to matters that he or she

> observed or of which he or she has first-hand knowledge. The second exception allows witnesses who, by education, training and experience, have acquired a certain specialized knowledge in some art, science, profession or calling, to state an opinion as to relevant and material matters. These witnesses may also state their reasons for their opinion.
>
> The purpose of opinion testimony is to assist you in understanding the evidence and deciding the facts in this case. In weighing this testimony, you may consider the opinion witness' qualifications, opinions, reasons for testifying, as well as all other considerations that ordinarily apply when you are deciding how to evaluate a witness' testimony. You are not bound to accept opinion testimony, and you should give it such weight as you think it fairly deserves and consider it in light of all the other evidence in this case.

Jury Instructions, pp. 11-12. Therefore, the jury was properly instructed, and there has not been an assertion, let alone any evidence, that the jury disregarded the detailed and accurate instructions of the Court.

Domino's next challenges the jury's verdict with respect to the tortious interference with BEI's efforts to sell the franchise. Domino's concedes that the jury was correctly charged that BEI had the burden of showing that it had a commercially reasonable expectancy of selling the pizza store for more than the $600,000 sale price, and that Domino's intentionally interfered with the sale. *See Defendants' Memorandum of Points and Authorities in Support of its Motion,* at 13. Domino's argues that no reasonable jury could have made such a determination.

However, the Court finds that the jury's verdict with respect to the tortious interference claim is supported by the evidence. The Plaintiff presented evidence of suspicious circumstances surrounding one potential purchaser's failure to obtain financing, and that another poten-

tial purchaser was aware of financial information known only to BEI and Domino's. A reasonable jury could have found, based upon this information and the other evidence presented, that BEI had a commercially reasonable expectancy of selling the pizza store for more than the ultimate sale price of $600,000, and that Domino's intentional interference with the sale deprived BEI of this business opportunity. As a result, Domino's is liable for the difference between its reasonable business expectancy and the actual sale price.

Furthermore, the $450,000 jury award for the tortious interference claim is not excessive, nor is it duplicative of the damages recovered under the breach of contract claim. First, as the Plaintiff points out, "it is not necessary for [BEI] to prove that it had a particular offer for a certain amount . . . ." *See Opposition to Defendants' Motion*, at 31; *accord Carr v. Brown*, 395 A.2d 79, 84 (D.C. Ct. App. 1978). Rather, the jury must determine the sale amount of which BEI had a reasonable business expectancy. There was evidence presented at trial that the pizza store could have sold for up to $1.5 million. Consequently, the jury could reasonably have found that BEI had a reasonable business opportunity to sell the store for $450,000 more than the $600,000 sale price. Second, the tortious interference damages award is not duplicative of the $850,000 breach of contract award. Domino's actions in breaching the contract were separate and apart from their actions in intentionally interfering with BEI's prospective business opportunity. Consequently, the damage awards are "discrete and not mutually exclusive." *Cunningham v. Healthco, Inc.*, 824 F.2d 1448, 1463 (5th Cir. 1987).

Finally, the jury's award of punitive damages is supported by the evidence. Punitive damages may be awarded when the "defendant's misbehavior demonstrates a particularly reckless disregard for the rights of another." *Nepera Chemical, Inc. v. Sea-Land Service, Inc.*,

794 F.2d 688, 698 (D.C. Cir. 1986). In this case, the award of punitive damages is supported by the evidence of Domino's intentional tortious interference with the sale of the pizza store. *See Franklin Inv. Co. v. Homburg,* 252 A.2d 95 (D.C. Ct. App. 1969). Furthermore, the punitive damages of $950,000 were not excessive in light of Domino's 1987 income of $887 million.

Furthermore, the jury could have found that the officers and directors of Domino's participated in, authorized, or ratified the intentional interference. *See Snow v. Capitol Terrace, Inc.*, 602 A.2d 121, 127 (D.C. Ct. App. 1992). As the Plaintiff has indicated, the trial record contains evidence of both authorization and ratification, both directly and indirectly. *See Opposition to Defendants' Motion,* at 33-36. Consequently, the jury's award of punitive damages in the amount of $950,000, was both appropriate and proper in light of the evidence presented at trial.

III. BECAUSE THE COURT PROPERLY INSTRUCTED THE JURY ON THE ISSUE OF DAMAGES FOR BREACH OF CONTRACT, THE PLAINTIFF'S MOTION TO ALTER OR AMEND THE JUDGMENT MUST BE DENIED.

The Plaintiff has filed a Moton to Alter or Amend the Judgment, claiming that the $850,000 damages award for its breach of contract claim should be increased by $600,000. The Plaintiff claims that the Court erred in directing the jury to subtract the $600,000 pizza store sale price from the profits lost because of the breach of contract.

Upon examination, the Court finds that it properly instructed the jury. The Court's jury instructions clearly state, with respect to the breach of contract claim:

> You may award to the Plaintiff those damages that fairly and reasonably can be considered to have

> arisen as a result of the alleged breach. Such damages include the value as of June 19, 1989, of the business income or profits that the Plaintiff would have received and the value of the pizza store at the end of the franchise period in the absence of the alleged breach by the Defendant. You should subtract from this amount the price for which the Plaintiff actually sold the franchise, which the evidence has shown to be $600,000, to determine the measure of damages for the Plaintiff's breach of contract claim.

This instruction properly directs the jury to measure the benefits lost because of the breach of contract and to subtract any value gained because of the breach. In this case, the breach caused the early sale of the pizza store, giving the Plaintiff $600,000 that it would otherwise not have had. The $600,000 must, therefore, be subtracted from the lost benefits. *See, e.g., Rowan Heating-Air Conditioning-Sheet Metal, Inc. v. Williams,* 580 A.2d 583 (D.C. Ct. App. 1990) (non-breaching party must be put in the same position it would have been in had the contract been performed).

In this case, had the contract been performed, the Plaintiff would have received profits over the years and the value of the pizza store at the end of the franchise agreement. The Plaintiff would not have been able to sell the store at the end of the agreement *and* in 1989. Consequently, the value received in 1989 ($600,000) must be subtracted from the compensatory damage award.

The Plaintiff argues that its opinion witness considered the $600,000 sale price when he estimated the profits and value of the pizza store lots because of the breach of contract. However, Mr. Gaskins, the opinion witness, testified to that effect before the jury during the trial. The jury was free, in its evaluation of the evidence, to accept or reject that testimony in whole or in part, and to decide whether Mr. Gaskins had properly taken the

$600,000 sales figure into account. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786, 2798 (1993) (a jury is capable of giving opinion witness testimony what weight it deems appropriate). The Court has no basis for assuming that the jury ignored the Court's instructions, which clearly directed the jury to calculate the "profits that the Plaintiff would have received and the value of the pizza store at the end of the franchise period" and to subtract "the price for which the Plaintiff actually sold the franchise . . . ," which is the proper measure of damages in a breach of contract case. In *Truitt v. Evangel Temple, Inc.*, 486 A.2d 1169 (D.C. Ct. App. 1984), the Court held that any monetary advantages obtained through another's breach of contract must be *subtracted* from any damage award. The jury obviously and correctly did so in this case.

IV. CONCLUSION

Upon consideration of the Defendants' Motion for Judgment as a Matter of Law and the Plaintiff's Motion to Alter or Amend the Judgment, the oppositions filed thereto, the applicable law, and the entire record herein, the Court must deny both Motions. The Court's instructions to the jury on the issue of damages were correct, and the jury's verdict was reasonable in light of the evidence presented at trial in this matter. The Court shall issue an Order of even date herewith consistent with the foregoing Memorandum Opinion.

/s/ Charles R. Richey
CHARLES R. RICHEY
September 3, 1993 United States District Judge

[Filed Sep. 3, 1993]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 92-1111 (CRR)

BENNETT ENTERPRISES, INC.,
Plaintiff,

v.

DOMINO'S PIZZA, INC., *et al.*,
Defendants.

ORDER

Upon consideration of the Defendants' Motion for Judgment as a Matter of Law or for a New Trial, the Plaintiff's Motion to Alter or Amend the Judgment, the oppositions thereto, the applicable law, the underlying record, and for the reasons articulated in this Court's Memorandum Opinion of even date herewith, it is, by the Court, this 3 day of September, 1993,

ORDERED that the Defendants' Motion for Judgment as a Matter of Law or for a New Trial shall be, and hereby is, DENIED; and it is

FURTHER ORDERED that the Plaintiff's Motion to Alter or Amend the Judgment shall be, and hereby is, DENIED.

/s/ Charles R. Richey
CHARLES R. RICHEY
United States District Judge

APPENDIX C

[Filed Apr. 7, 1995]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 93-7188

BENNETT ENTERPRISES, INC.,
Appellee,

v.

DOMINO'S PIZZA, INC.,
Appellant,

and Consolidated Case No. 93-7189

BEFORE: Silberman, Buckley and Sentelle, Circuit Judges

ORDER

Upon consideration of the Petition for Rehearing of Bennett Enterprises, Inc., it is

ORDERED, by the Court, that the petition is denied.

FOR THE COURT:

MARK J. LANGER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

[Filed Apr. 7, 1995]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 93-7188

BENNETT ENTERPRISES, INC.,
Appellee,

v.

DOMINO'S PIZZA, INC.,
Appellant,

and Consolidated Case No. 93-7189

BEFORE: Edwards, Chief Judge; Wald, Silberman, Buckley, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel, Circuit Judges

ORDER

The Suggestion For Rehearing *In Banc* of Bennett Enterprises, Inc., has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing, it is

ORDERED, by the Court *in banc*, that the suggestion is denied.

FOR THE COURT:

MARK J. LANGER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

APPENDIX D

Excerpts of Trial Transcript from the United States District Court for the District of Columbia Before Richey, J. on 16 June 1993

* * * *

[557] MR. VERHEY: Your Honor, we would move for a directed verdict at this point on both counts.

THE COURT: You want to move for a directed verdict? Is that what you said?

MR. VERHEY: Directed verdict.

THE COURT: I see. Go ahead.

MR. VERHEY: I believe the language of paragraph 15.2 is unambiguous. It says, "operate a store in full compliance with all applicable laws, ordinances, regulations." Both Bruce and Arthur Bennett admit that they had an obligation to pay taxes to the various taxing authorities. Bruce Bennett specifically admitted that the tax laws were applicable to his [558] business.

THE COURT: All right. We don't have, under Rule 50(a), a motion for a directed verdict anymore. That's been abolished and changed. However, you do have a motion for judgment as a matter of law which performs the same office or function. The reason I mention this is to alert you to the fact that you ought to be reading, all of the lawyers, the rules as amended from time to time, and there are a whole series of amendments proposed for the civil and criminal rules and evidence rules now pending before the Congress of the United States so you better read them again.

In any event, your motion is denied. What about Count Number 2?

MR. VERHEY: On Count 2, I don't believe plaintiffs have put on any evidence of any interference in the sale of the franchise to Mr. Duignan. There is no direct evidence in the record that Domino's interfered. All we have is circumstantial evidence that because they say

Pat Harriday gave them a value of $400,000 for the store that thereafter Mr. Duignan withdrew his $900,000 offer, that somehow the jury should infer some sort of interference there.

Fred Meeks made one and only one offer for the store. That was $500,000. He never budged from that offer. So even if they can prove interference, they cannot show damage with respect to Mr. Meeks because there was never an offer higher [559] that he would have made were it not for information that he received from Domino's Pizza.

With respect to Mr. Duignan, the only evidence is that he withdrew the offer because he could not get financing. Plaintiff has proved nothing to the contrary.

THE COURT: Is that it?

MR. VERHEY: Yes, Your Honor.

THE COURT: Mr. McManus, do you want to say anything to me?

MR. McMANUS: Your Honor, I think we have proved each and every element for tortious interference with the direct evidence in the case including through the last two witnesses.

MR. VERHEY: Your Honor, if I may add one additional point, I don't believe the plaintiff has proven that they had a valid expectancy of receiving more than $600,000 for the value of the store. Their own expert conceded that the royalty sales were approximately 1.2 million for the prior 12 months. If you apply the 1.2 million in royalty sales to the successful store formula, it comes out to $600,000, exactly what they got for the price of the store. Whether Pat Harriday told them they could get 1.2 million for the store is irrelevant because that's not what the formula is.

* * * *

[612] MR. SEIDLER: Am I to take it when we were out there before you denied our motion for a directed verdict at the close of all the evidence on both counts?

THE COURT: I didn't deny any motion for a directed verdict ever in this case.

MR. SEIDLER: I'm sorry. Judgment as a matter of law at the close of the evidence.

THE COURT: Yes, I did.

* * * *

[Bruce S. Bennett, plaintiff's witness sworn, on direct examination:]

[119] [Bruce Bennett:] The only time I ever discussed taxes with Mr. Miller was at a brief meeting during the very early weeks of the business. Mr. Miller informed me that he could pay the taxes in a couple of different ways, including on a quarterly basis. I believed this discussion concerned all aspects of our business taxes. I did not provide Mr. Miller with any instructions regarding taxes because I knew nothing about the mechanics of what had to be done and relied on Mr. Miller to take care of us. Mr. Miller was also responsible for providing all of the paperwork to Domino's.

* * * *

[121] It turned out that our accountant had not been taking care of our tax payments like he was supposed to. I first became aware that taxes were not being paid when I received a delinquency notice from the District of Columbia in mid 1988. I received this notice while Steve Taylor was our accountant. Steve Taylor began working as our accountant in June or July of 1988. Mr. Miller had been replaced.

After receiving the deficiency notice from the District of Columbia government, I went to Domino's regional office where I discussed the matter with Ms. Harriday. I asked Ms. Harriday to give me some directions, since Steve Taylor was busy working on the profit and loss statements that Domino's had been complaining about. Ms. Harriday's reply was to tell me that taxes had to be

paid, and that I should discuss the matter with Mr. Taylor.

* * * *

[123] The particular assistance that we needed with regard to the accounting problem and the tax situation was never given to us by Domino's. In late July of 1988, Domino's conducted an audit of our store, however, while this audit was occurring, Domino's did not mention it to me. Only after the audit was completed was I informed that an audit had taken place. While the individuals were in the store conducting the audit, I was told that these individuals were simply looking over the paperwork to see if they could offer any ideas to help us submit our profit and loss statements in a timely fashion. Nothing was ever said to us about tax problems.

* * * *

[130] They had given us no assistance for months when they had known of the problem, and now that we had started to get it resolved, we felt they were harassing us by sending us this letter.

* * * *

[134] Ms. Harriday then told me that there was a new buy-out formula applicable for stores that were not distressed. Ms. Harriday said that with our high level of sales the store was not considered distressed. I was then given a copy of the new buy-out formula for successful stores. Here is Exhibit 110, which is a copy of that buy-out formula.

After calculating the new buy-out formula, Ms. Harriday arrived at a figure of approximately $1.2 million, using sales figures from December, 1987, to December, 1988.

* * * *

[139] Soon thereafter, however, we were contacted by Jim Duignan, who now said that he could not go through with the purchase of the store because he could not obtain a financing from his bank. Prior to the time that I had

received Frank Meeks' offer made on May 23, 1989, and Jim withdrew his $900,000 offer, we were contacted by Ms. Harriday sometime during the week of May 15, 1989, who explained that the store had been reclassified as a distressed store. She told us that we could no longer use the successful store formula, and that our store was only worth about $400,000. Ms. Harriday provided no explanation for her devaluation of our store.

Ms. Harriday specifically stated that the successful store should no longer be applied and that the distressed store formula should be applied. Ms. Harriday also told us that the sale of the store had to be completed by June 1st or Domino's would take the store.

* * * *

[Arthur G. Bennett, plaintiff's witness, on direct examination:]

[207] ARTHUR BENNETT: Immediately after opening, our store was a huge success. This is Exhibit Number 128. It's notes from John Fritchett about how good our sales were. We continually ranked in the top 10 in sales for all Domino's Pizza franchises.

* * * *

[Patricia Harriday, defendant's witness, on direct examination:]

[354] * * * These are Defendant's Exhibits Numbers 12 and 13, which are copies of the letters I received in early February.

Based on these letters, we decided to remove the Bennett store from default status for the time being. At that time, a form letter was issued from Domino's Pizza Franchise Services Department in Ann Arbor advising the Bennetts that they had corrected the default. However, at that time, I told Bruce that it was my understanding that, based on what the letters from the D.C. Departmen of Finance said about having a payment plan in

place for the District of Columbia within a couple of weeks and that based upon what Gordon Clay had told me about the six- to 10-week time period for setting up a payment plan with the IRS, we expected the tax deficiency to be resolved with all the taxing authorities within the time frames they had given us, or we could enforce the contract again.

In addition, I told them that we were to be provided with copies of all communications from the taxing authorities. After that, I checked periodically with Gordon Clay and with Bruce Bennett to determine their progress in setting up payment plans, but I was never furnished with any payment plan and was never given any concrete information on what progress was being made to get the payment plan.

* * * *

[Patricia Harriday, defendant's witness, on cross-examination:]

[384] Q So both of the letters do reference the region's, or Domino's, buying the Bennett store.

A One says whether or not we will exercise our right of first refusal, which mean we would have 30 days to decide whether we wanted it or not. So in that letter, I would think we're thinking about it. And the second letter, it basically says that if the sale cannot go through that Domino's would buy the store. That's what it says on the bottom for the contract price.

* * * *

[385] Q But you never mentioned to the Bennetts about taxes when they were even applying for the store, did you, ma'am?

A I taught a Franchise A class along with Stuart Mathis, and in that class it covers a section on finances. That was probably the only mention that I made to them, because I was not the FOD at that time. I was consultant in the field.

Q Do you remember my taking your deposition on January 6, 1993, this year?

A Yes.

Q Do you recall my asking you the question: "Did you ever talk to the Bennetts about taxes," and your response being, "No, I did not"?

* * * *

[Gary L. French, defendant's witness, on direct examination:]

[514] GARY FRENCH: Shortly before going to his banker, Mr. Duignan received the financials, and they revealed that the store was realizing only 1.3 million a year in royalty sales. But he really wanted the store, and he went to the bank to arrange financing for 900,000 anyway.

* * * *

[Stuart Mathis, plaintiff's witness, on direct examination:]

STUART MATHIS:

[537] A I don't recall specifically the time frame post my joining the region that I put them in default. I believe it was more than one week.

Q You did put them in default, isn't that correct?

A I put them in default.

Q And it was very shortly after you arrived here in the Washington area.

A Within the first month.

Q And you did this despite the fact that you thought it was a viable store at the time, isn't that correct, sir?

A The store was viable from a sales viewpoint, but it did have operational problems, financial problems.

Q The store was viable at the time you put them in default, isn't that correct, sir?

A From a sales viewpoint, yes.

* * * *

[539] Q You didn't want Domino's to pay $600,000 for the store.

A No.

Q But you would have considered buying it at the so-called "distressed" formula of about $400,000, isn't that correct, sir?

A Yes.

* * * *

Q And part of the reason to know what the price was, was to determine whether or not you wanted to buy it—whether or not Domino's wanted to buy it?

A Yes. Domino's has the right of first refusal on any offer to buy a Domino's Pizza store.

[Franklin Oscar Meeks, plaintiff's witness, on direct examination:]

[549] Q Do you recall being asked the question: "In the conversation that you had with the Bennetts and Mr. Lewis in his office, was there a date selected for the completion of all the details and settlement?"

And your answer: "Well, they had told me, and we knew before, that Domino's Pizza had apparently told them that they needed to sell the store by June 1." That was your testimony then, wasn't it sir?

[FRANK MEEKS:] Yeah, because they had told us, "they" meaning the Bennetts, had told us in their telephone conversation with Craig Kendall in my office that they wanted to sell.

Q I'll read it to you again, sir, so we are clear about exactly what it was you said.

MR. VERHEY:May I have the page reference?

MR. MCMANUS: Page 18.

BY MR. McMANUS:

Q "Well, they had told me, and we knew before, that Domino's Pizza, Inc., had apparently told them that they needed to sell the store by June 1." Did you also know

that Jim Duignan was talking to the Bennetts about buying the store in May of 1989?

A Yes.

[550] Q Did you ever make an offer for the store?

A Yes.

Q What was your offer?

A $500,000.

Q And at the time you thought that your offer was one that exceeded the Domino's Pizza buy-out because the store was not classified as successful, isn't that correct?

A I knew that my offer exceeded the Domino's Pizza contract formula price.

Q And that the store was not classified as a successful store, is that correct, sir?

A By Domino's Pizza, yes.

Q And you knew that?

A Yes.

Q That it had not been classified as successful by Domino's?

A Right.

* * * *

[551] Q And you had one particular personal conversation where she told you about the Bennett's operational problems, isn't that correct, sir?

A Yes.

Q And that conversation took place for about two hours, isn't that correct, sir?

A Well, we had a—we were touring stores for two hours, but we didn't talk about operational problems for two hours, and she didn't tell me specifically what operational problems were. I told her I thought they had operational problems, and she told me in her view that they did, but she didn't go into detail as to what they were.

Q She told you about the operational problems, though, right?

A Oh, yes.

* * * *

[James M. Duignan, defendant's witness, on cross-examination:]

JAMES DUIGNAN:

[574] Q And you thought the $900,000 price or offer that you made was a fair price for the Bennetts' franchise, isn't that correct, sir?

A From the information that I received at that time, yes.

Q But you knew it was one of the top stores in sales, correct?

A Yes.

Q And your own similar stores, you've testified, were worth more than $900,000, weren't they, sir, at the time?

A At the time that's what my thoughts were.

* * * *

[Patricia Garuffi, Plaintiff's rebuttal witness, on direct and cross-examination:]

[602] Q Were you notified on or about February 18, 1988 that the Bennetts may not have been paying any business taxes?

A Yes.

* * * *

[605] Q You also remember that Domino's Pizza did its best to help the Bennetts work through their financial and tax problems?

A Yes, I do.

MR. SEIDLER: No further questions.

MR. McMANUS: Nothing further, Your Honor.

THE COURT: All right. You may be excused, ma'am. Thank you very much.

THE COURT: Next.

MR. McMANUS: The plaintiff has no further witnesses, sir.

THE COURT: Do you rest?

MR. McMANUS: Yes, sir.

THE COURT: Ladies and gentlemen, that concludes all the evidence in the case, and I will now take this

opportunity while you rest a few moments, and goodness knows you deserve it, to share with the lawyers, as I am obliged to do, the law in this case which will provide a framework within which you will be asked to decide the facts later on this afternoon and conclude your work today.

(Jury out at 2:25 p.m.)

THE COURT: Counsel, you may follow me to my colleague Judge Revercomb's jury room.

* * * *

APPENDIX E

PLAINTIFF'S EXHIBITS

11. OPERATING ASSISTANCE

11.1 *Advice and Guidance.* We will furnish you with such reasonable operating assistance as we determine from time to time to be necessary for the operation of the Store. Operating assistance will include advice and guidance regarding:

a. methods of pizza preparation, packaging and sale;

b. hiring and training employees;

c. formulating and implementing advertising and promotional programs; and

d. the establishment of administrative, bookkeeping, accounting, inventory control and general operating procedures.

You understand that the assistance provided to you under this Paragraph 11 does not obligate us to operate the Store on your behalf at any time during the term of the franchise or to provide the accounting or bookkeeping services required for the operation of the Store.

11.2 *Operating Problems.* We will advise you from time to time of operating problems of the Store disclosed by reports submitted to or inspections made by us. We will make no separate charge for operating assistance except that we may make reasonable charges for forms and other materials supplied to you and for operating assistance made necessary in our judgment as a result of your failure to comply with any provision of this Agreement or for operating assistance requested by you in excess of that normally provided by us.

* * * *

[Domino's Logo]

Domino's Pizza, Inc.
Prairie House, Domino's Farms
30 Frank Lloyd Wright Drive, P.O. Box 997
Ann Arbor, Michigan 48106-0997

December 22, 1988

Mr. Bruce Bennett
Bennett Enterprises, Inc.
2305 Wheatley Drive, #302
Baltimore, MD 21207

Registered/Certified Mail #P937 671 418

Dear Bruce:

Please consider this letter to be official notification of default as required per Paragraph 34 ("TERMINATION AND EXPIRATION") of the Standard Franchise Agreement dated December 7, 1987 by and between you and Domino's Pizza, Inc. for Store #2226, located at 333 Hawaii Avenue, N.W., Washington, D.C.

It has come to our attention after conducting an audit that you have failed to pay Federal Withholding Taxes, State Withholding Taxes, District of Columbia Withholding Taxes, District of Columbia Sales Taxes, District of Columbia Unemployment Taxes and Federal Unemployment Taxes. Under the terms of Paragraph 15.2 ("COMPLIANCE WITH LAWS AND OTHER BUSINESS PRACTICES") you are required to operate the store in full compliance with all applicable laws. therefore, failure to pay these taxes, along with interest and penalties, has placed you in operational default of your Standard Franchise Agreement.

Per the terms of Paragraph 18 ("TERMINATION AND EXPIRATION") and applicable state law, you shall have thirty (30) days to cure the aforementioned default. Default shall be cured by submitting evidence that all past due tax liabilities plus penalties and interest have

been paid to date or that you have otherwise satisfied or settled with all of the aforementioned State and Federal Tax Entities. Copies of cancelled checks, tax returns/ billings which indicate that all taxes due plus penalties and interest have been paid shall be submitted as evidence of proper payment and subsequent satisfaction of all tax liabilities.

Per Paragraph 22.7 ("NOTICES") of Standard Franchise Agreement, all written notices shall be deemed delivered three (3) days after placement in the United States Mail by Registered or Certified Mail.

In the event that said default is not cured within thirty (30) days after delivery of notice, your Standard Franchise Agreement and all franchise rights granted thereunder will be subject to termination on January 23, 1989. In the event that said Standard Franchise Agreement shall be terminated, Domino's Pizza, Inc. will expect full compliance with Paragraph 18.3 ("OBLIGATIONS UPON TERMINATION OR EXPIRATION") of said Standard Franchise Agreement and full compliance of Paragraph 20.2 ("FRANCHISEE'S COVENANTS NOT TO COMPETE") of said Standard Franchise Agreement.

Sincerely,

/s/ Robin K. Moss
ROBIN K. MOSS
Area Franchise Administrator
Franchise Services

rkm/G193

cc: Deborah Sargent
Donna Owen
Dave Black
Brad Biggers
Pam Date
Pat Garufi
Kevin Williams

Regular Mail copies sent to:

2305 Wheatley Dr. #302
Baltimore, MD 21207

333 Hawaii Avenue
Washington, D.C.

[Dominio's Logo]

February 8, 1989

Mr. Bruce Bennett
Bennett Enterprises, Inc.
2305 Wheatley Drive #302
Baltimore, MD 21207

Registered/Certified Mail #P 892 123 148

Dear Bruce:

I have been advised by the Wililams Regional Office that you have cured the financial default as described in my letter of official notification of default dated December 22, 1988, for Store #4335, located at 333 Hawaii Avenue, NE, Washington DC 20011.

Consequently, no further action is required. Please be advised however, that Domino's Pizza, Inc. does not waive its right to place you in default for additional or future violations of your Standard Franchise Agreement.

Thank you for your cooperation. If I may be of any asisstance to you in the future, pleace do not hesitate to contact me.

Sincerely,

/s/ Robin K. Moss
ROBIN K. MOSS
Area Franchise Administrator
Franchise Services

rkm/G361

cc:		
	Deborah Sargent	Regular mail copies sent to:
	Donna Owen	
	Dave Black	2305 Wheatley Dr. #302
	Brad Biggers	Baltimore, MD 21207
	Pam Date	
	Pat Garufi	333 Hawaii Avenue
	Kevin Williams	Washington, D.C.

[Domino's Logo]

Domino's Pizza Inc.
Prairie House, Domino's Farms
30 Frank Lloyd Wright Drive, P.O. Box 997
Ann Arbor, Michigan 48106-0997

April 28, 1989

Mr. Bruce Bennett
Bennett Enterprises, Inc.
2305 Wheatley Drive, #302
Baltimore, MD 21207

Registered/Certified Mail #P981 082 250

Dear Bruce:

Please consider this letter to be official notification of default as required per Paragraph 18 ("TERMINATION AND EXPIRATION") of the Standard Franchise Agreement dated December 7, 1987 by and between you and Domino's Pizza, Inc. for Store #4335, located at 333 Hawaii Avenue, N.W., Washington, D.C.

It has come to our attention after conducting an audit that you have failed to pay Federal Withholding Taxes, State Withholding Taxes, District of Columbia Withholding Taxes, District of Columbia Sales Taxes, District of Columbia Unemployment Taxes and Federal Unemployment Taxes. Under the terms of Paragraph 15.2 ("COMPLIANCE WITH LAWS AND OTHER BUSINESS PRACTICES") you are required to operate the store in full compliance with all applicable laws. therefore, failure to pay these taxes, along with interest and penalties, has placed you in operational default of your Standard Franchise Agreement.

Per the terms of Paragraph 18 ("TERMINATION AND EXPIRATION") and applicable state law, you shall have thirty (30) days to cure the aforementioned default until June 1, 1989. Default shall be cured by submitting evidence that all past due tax liabilities plus penalties and

interest have been paid to date or that you have otherwise satisfied or settled with all of the aforementioned State and Federal Tax Entities. Copies of cancelled checks, tax returns/billings which indicate that all taxes due plus penalties and interest have been paid shall be submitted as evidence of proper payment and subsequent satisfaction of all tax liabilities.

Per Paragraph 22.7 ("NOTICES") of Standard Franchise Agreement, all written notices shall be deemed delivered three (3) days after placement in the United States Mail by Registered or Certified Mail.

In the event that said default is not cured within thirty (30) days after delivery of notice, your Standard Franchise Agreement and all franchise rights granted thereunder will be subject to termination. In the event that said Standard Franchise Agreement shall be terminated, Domino's Pizza, Inc. will expect full compliance with Paragraph 18.3 ("OBLIGATIONS UPON TERMINATION OR EXPIRATION") of said Standard Franchise Agreement and full compliance of Paragraph 20.2 ("FRANCHISEE'S COVENANTS NOT TO COMPETE") of said Standard Franchise Agreement.

Sincerely,

/s/ Robin K. Moss
ROBIN K. MOSS
Area Franchise Administrator
Franchise Services

rkm/G660

cc: Deborah Sargent
Donna Owen
Dave Black
Brad Biggers
Pam Date
Pat Garufi
Pat Harriday
Stuart Mathis

Regular Mail copies sent to:

2305 Wheatley Dr. #302
Baltimore, MD 21207

333 Hawaii Avenue
Washington, D.C.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF FINANCE AND REVENUE

Associate Director for
Audit Compliance &
Investigation Administration

February 6, 1989

Dear Mr. Bennett:

I have received your request for a status report on our negotiation regarding un-paid taxes on Domino's Pizza, located at 333 Hawaii Avenue, N.E., Washington, D.C. 20011.

I am in receipt of all tax returns and we are currently computing the total liability including penalty and interest up to date. The current returns for December have been received and paid in full.

It is expected that a payment schedule will be signed in about 10 days upon receipt of cash flow projections.

If I can be of further assistance, please call me at 727-2013.

Sincerely,

/s/ Sidney Williams
SIDNEY WILLIAMS
Supervisory Revenue Officer

APPENDIX F

DEFENDANT'S EXHIBIT

Internal Revenue Service
memorandum

date: February 6, 1989

to: Domino's Pizza Inc.
Attn: Patricia Harriday

from: Michael J. Casey,
Revenue Officer,
Internal Revenue Service
1201 E St. NW, Room #704
Washington, D.C. 20226

subject: Bennett Enterprises Inc.

1. This letter is to advise you that Mr. Bennett did come into our office this morning with his acocuntant, to make arrangements for payment of the 941 tax liabilities.

2. The tax assessments have not been made at this time, but arrangements have begun to ensure that these taxes are paid.

3. If you have any questions, please call me at 202 376-0074.

Respectfully,

/s/ Michael J. Casey
MICHAEL J. CASEY

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 92-1111 CRR

Judge Charles R. Richey

BENNETT ENTERPRISES, INC.
Plaintiff,

vs.

DOMINO'S PIZZA, INC., and
DOMINO'S PIZZA DISTRIBUTION CORPORATION, INC.,
Defendants.

DEFENDANT DOMINO'S PIZZA, INC.'s MOTION FOR JUDGMENT AS A MATTER OF LAW OR FOR A NEW TRIAL

Defendant Domino's Pizza, Inc., by its attorneys, for its motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50 or, in the alternative, for a new trial pursuant to Fed. R. Civ. P. 59, states as follows:

1. On June 16, 1993, a jury returned a verdict in favor of plaintiff Bennett Enterprises, Inc. ("Bennett") and against defendant Domino's Pizza, Inc. ("Domino's") in the amount of $850,000.00 on Bennett's breach of contract claim, $450,000.00 on Bennett's claim of intentional tortious interference with prospective economic advantage or business opportunity, and $950,000.00 for punitive damages. Judgment was entered in accordance with the jury's verdict on June 17, 1993.

2. Domino's is entitled to judgment as a matter of law as follows:

(a) As to liability for breach of contract, because the jury could not reasonably have concluded that Domino's breached the Franchise Agreement either by defaulting and terminating Bennett's franchise for nonpayment of taxes, or by failing to provide promised assistance with respect to Bennett's tax situation, nor could the jury reasonably have found that Bennett suffered any damage as a result of a breach of the Franchise Agreement by Domino's failure to furnish any required assistance.

(b) As to damages for breach of contract, because the jury could not reasonably have found with reasonable certainty that Bennett sustained damages on account of lost profits because the evidence of such loss profits is based purely on speculation and conjecture.

(c) As to liability for tortious interference with prospective economic advantage, because no jury reasonably could have concluded that Bennett had a commercially reasonable expectation to sell the store for more than the $600,000.00 that it received from James Duignan, that Domino's wrongfully interfered with the sale of the store, or that Domino's interfered in the sale of the store with the requisite improper motive or intent.

(d) As to damages for intentional interference with prospective economic advantage, because the jury could not reasonably have concluded that Bennett lost a business opportunity with a value in excess of the $600,000.00 which it received for the store, and because any damages award for the lost value of the store upon sale in June 1989 conflicts with, and is duplicative of, a breach of contract award for lost profits and the proceeds of the sale of the store at the end of the contract term.

(e) As to liability for punitive damages, because the jury could not reasonably have concluded that

any act of Domino's was performed with the requisite malice or was of a sufficiently outrageous character to warrant the imposition of punitive damages, and because the jury could not reasonably have found that any officer or director of Domino's participated in, authorized or ratified the conduct constituting tortious interference with prospective economic advantage.

3. Domino's is also entitled to a new trial on each of the issues set forth above because the jury's verdict with respect thereto is against the weight of the evidence.

4. Domino's is also entitled to a new trial on the following grounds:

(a) As to liability for breach of contract, because it was error to have admitted into evidence forms of the Standard Franchise Agreement utilized by Domino's subsequent to the execution of the Standard Franchise Agreement between it and Bennett (Plaintiff's Exhibits 4-8).

(b) As to damages for breach of contract, because an award of $850,000.00 in "lost profits" in addition to the $600,000.00 Bennett received on the sale of the store, is excessive and the product of passion and prejudice, and because it was prejudicial error to admit into evidence the speculative and conjectural lost profits opinion of Plaintiff's opinion witness, Rick Gaskins, as reflected in Plaintiff's Exhibit 116.

(c) As to damages for tortious interference with prospective economic advantage, because damages of $450,000.00 in excess of the $600,000.00 actually obtained for the business from Jim Duignan was excessive and the product of passion and prejudice.

(d) As to punitive damages, because it was error to have submitted the case to the jury on the theory of punitive damages.

5. Domino's respectfully requests that this matter be set for hearing before the Court.

WHEREFORE, defendant Domino's Pizza, Inc. prays for the entry of an order granting judgment as a matter of law, dismissing the complaint in its entirety on Counts I and II, or granting it a new trial on Counts I and/or II as to liability and/or damages, as appropriate.

Date: July 1, 1993

Respectfully submitted,

SHAW, PITTMAN, POTTS
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APPENDIX H

Excerpts of Brief of Appellant Cross-Appellee Domino's Pizza, Inc. from the United States Court of Appeals for the District of Columbia Circuit Appeal No. 93-7188, filed ———

* * * *

STATEMENT OF ISSUES

I. Whether the district court erred in denying Domino's motion for judgment as a matter of law on liability for breach of contract because a contractual provision requiring BEI's full compliance with "all applicable laws, ordinances and regulations" authorized Domino's to default and terminate BEI for failure to pay taxes?

II. Whether the district court erred in denying Domino's motion for judgment as a matter of law on liability for breach of contract because no reasonable juror could have found that Domino's breached its obligation to provide reasonable assistance to BEI with respect to its tax problem or that such assistance was causally related to BEI's nonpayment of taxes?

III. Whether the district court erred in denying Domino's motion for judgment as a matter of law on liability for breach of contract because BEI did not establish that it had fully performed all of its obligations under the franchise agreement?

IV. Whether the district court erred in denying Domino's motion for judgment as a matter of law on damages for breach of contract because the evidence of lost profits damages, which consisted of an expert's assumptions that had no factual basis in the record and no relationship to economic reality, was too speculative and conjectural?

V. Whether the district court's erroneous admission of evidence on one of BEI's two theories of liability for breach of contract requires a new trial when it is impossible to determine on which theory of liability the jury's verdict rested?

VI. Whether the district court erred in denying Domino's motion for judgment as a matter of law on liability for tortious inference because no reasonable juror could have found that Domino's interfered with a valid expectancy of BEI to sell its business for more than $600,000?

VII. Whether the district court erred in denying Domino's motion for judgment as a matter of law on the issue of punitive damages because there was no evidence that Domino's conduct was outrageous or egregious or that any officer or director of Domino's participated in, authorized or ratified the interference?

VIII. Whether the jury's award of lost profits damages for breach of contract and its award of compensatory damages for tortious interference are duplicative since they both compensate for the same injury, the loss of BEI's business?

STATEMENT OF THE CASE

This case presents the issues of 1) whether Domino's breached its franchise agreement with BEI by defaulting and terminating BEI's franchise based on BEI's failure to pay taxes; and 2) whether Domino's tortiously interfered with BEI's attempt to sell its business following the default.

* * * *